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## THE RULE OF LAW AND OBEDIENCE TO LAW

Colleen Murphy\*

PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (CAMBRIDGE UNIVERSITY PRESS 2016). PP. 285. HARDCOVER \$125.00. PAPERBACK \$34.99.

In *The Rule of Law in the Real World*, Paul Gowder engages three audiences: legal scholars and philosophers interested in the concept and normative value of the rule of law, political scientists interested in measuring and empirically assessing the degree to which societies meet its demands, and development scholars aiming to cultivate the rule of law in contexts where it is currently absent or minimally present. Gowder covers an impressive range of materials from across disciplines, and his synthesis of different strands of thought about the rule of law is brilliant. After providing a brief summary of Gowder's positive account, I question one assumption underpinning his argument.

Gowder defends a version of the rule of law that consists in three basic principles: a principle of *regularity* (which requires officials in their conduct and action to adhere to a reasonable conception of what declared legal rules permit and prohibit, especially in the coercive use of state power);<sup>1</sup> *publicity* (which requires the rules on the basis of which officials will respond to the conduct of legal subjects to be made known to legal subjects in advance, be justified or justifiable to them, and be open to contestation by those subject to coercion).<sup>2</sup> These first two principles constitute the weak version of the rule of law and provide safeguards against two kinds of threats: *hubris* (in which officials act coercively towards subjects without offering any reason for the basis of their actions, and in this way treat legal subjects as their inferiors not warranting any explanation);<sup>3</sup> and *terror* (in which the conditions under which officials use coercion is not made known to citizens in advance and so subjects are not put in a position where they can reliably determine what actions to take to avoid coercive treatment).<sup>4</sup> These two conditions, Gowder argues, are mutually reinforcing.<sup>5</sup> This minimal version does not place demands on the substantive content of law; it does not entail respect for rights and is compatible with unjust articulations of the

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1. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 12–15 (2016).

2. *Id.* at 15–18.

3. *Id.* at 19–20.

4. *Id.* at 20–22.

5. *Id.* at 13.

conditions under which coercion will be exercised.<sup>6</sup> The third condition, which transforms the rule of law from its weak to strong version, is a principle of *generality* (which requires laws to treat legal subjects equally, or as equals).<sup>7</sup> Gowder specifies the demands of generality as a demand to satisfy the constraints of public reason.<sup>8</sup> The explanation of the purpose of a particular regulation must appeal to reasons for those asked to obey, legislators, as well as the broader community. Such reasons cannot hinge on the subordinate status of some relative to others to explain why a given rule obtains.<sup>9</sup> Together, these principles constitute the rule of law as an egalitarian ideal, structuring relationships of vertical equality (between legal subjects and officials) and horizontal equality (among citizens).<sup>10</sup>

After articulating these three principles, which he notes can be met to different degrees and which do not require any specific institutional arrangement, Gowder goes on to show how ancient Athens and contemporary Britain fared according to the criteria articulated above.<sup>11</sup> He then considers the conditions under which the rule of law will be stable and under which it can be cultivated in contexts where it is absent.<sup>12</sup> Stability turns on equality in Gowder's view; to the extent that a legal system satisfies the generality condition it is stable in part because of the commitment to the rule of law this generates.<sup>13</sup> Similarly, generating the rule of law is a function of generating commitment to law as the way in which interaction between citizens and officials and among citizens will be structured, as well as fostering control of the use of force by the state among other conditions.<sup>14</sup>

Like all theories, Gowder's account has a certain set of starting points and basic assumptions that orient his theory. I focus in my critical remarks on one: rejecting the claim that the rule of law requires obedience on the part of citizens.

A consistent commitment of Gowder's is that the demands of the rule of law are demands on officials or those individuals or groups who exercise state-like power.<sup>15</sup> His hesitancy to include any obligation of obedience on the part of citizens is based in part on his understanding of the source of the problem to which the rule of law is a solution.<sup>16</sup> The law, in Gowder's view, is a safeguard against tyranny and the tyrannical use of the power of the state to oppress and unjustly use violence against those subject to its power.<sup>17</sup> This is why the rule of law constrains officials in their exercise of power. Moreover, demanding that citizens obey the law risks putting citizens in a position where they are being asked to submit to their own oppression, rather than putting them in a position to contest state power

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6. GOWDER, *supra* note 1, at 13–19.

7. *Id.* at 28–41.

8. *Id.* at 33–41.

9. *Id.* at 35–40.

10. *Id.* at 40–41.

11. GOWDER, *supra* note 1, at 97–141.

12. *Id.* at 161–67.

13. *Id.*

14. *Id.* at 171–72.

15. *Id.* at 143–67.

16. GOWDER, *supra* note 1, at 143–67.

17. *Id.* at 51–52.

and its abuse. This implication would potentially undermine the notion that the rule of law is a moral good.<sup>18</sup>

However, Gowder's concerns seem to rely on an overly simplistic view of how we should conceptualize any requirement of obedience on the part of citizens. It is possible for an obligation to obey the law to be conditional in nature. One may have an obligation to obey the law, conditional in part on what government officials do. To the extent that government officials fail in their obligations to adhere to the requirements of the rule of law, they undermine the conditions on which any obligation of obedience on the part of citizens depends. As Lon Fuller, who defends the claim that there is an obligation to obey the law, notes:

[T]here is a kind of reciprocity between government and citizen with respect to the observance of rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.<sup>19</sup>

One of the places Gowder defends the claim that obedience to law on the part of citizens is not what the rule of law requires is in his discussion of lynching in the United States. He references the case of Willie James Howard, whose killers were never prosecuted and whose grave went unmarked. His case, like others, Gowder claims, tells us about the instrumental complicity of state authorities in private racial terror, allowing Whites to take individuals from jail, impeding chances of prosecution for those implicated in lynching, and participating in lynching in certain cases. Officials were instrumentally complicit in the sense that "at those rare moments where local officials actually tried to put a stop to the lynchings, they largely succeeded."<sup>20</sup> He concludes:

The rule of law is a condition to be established by and through the state, and by limiting the rule of law critique to a critique of the state's behavior, we enable ourselves to see what the state did distinctively wrong in handling the lynchings: it withdrew its protections unequally from Black citizens.<sup>21</sup>

In my view, the picture Gowder describes of lynchings overstates the independence of the power of the state from citizens, and, relatedly, it ignores the importance of the willingness of citizens to obey the law for the rule of law itself. To see its misleading character, let me consider another case, that of Sam Hose, a twenty-one-year-old Georgian who was lynched in 1899.<sup>22</sup> Sam Hose was lynched for killing his White employer, Alfred Cranford, and allegedly raping his wife Mattie in their home after an altercation.<sup>23</sup> Following the murder and alleged rape, Hose fled the town of Palmetto, Georgia.<sup>24</sup> Local newspapers ran stories about the murder and rape, writing that when Hose was caught he

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18. *Id.* at 52.

19. LON L. FULLER, *THE MORALITY OF LAW* 39–40 (1964).

20. GOWDER, *supra* note 1, at 54.

21. *Id.* at 55.

22. PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 3–17 (2002).

23. *Id.* at 7.

24. *Id.* at 9.

would be killed or burned at the stake and warning law enforcement not to interfere with “the people’s will” by protecting Hose from the lynch mob.<sup>25</sup> Given the gravity of the case, articles stated, the people could not be expected to wait until law enforcement and the courts weighed in.<sup>26</sup> Along with this narrative, pictures of Hose were published as well as details of a substantial financial award, compiled by contributions from newspapers and wealthy businessmen as well as the governor for Hose’s capture.<sup>27</sup> As in the case Gowder considers, police failed in their investigation, not going to the crime scene to gather evidence and only talking to the close friends and family of Cranford.<sup>28</sup>

What matters for my purposes is the manner in which Hose was eventually captured and what transpired between his capture and brutal death. Hose had fled to his mother’s home, seventy-five miles away from the town of the murder.<sup>29</sup> Eventually the owners of the farm on which his mother stayed, brothers J.B. and J.L. Jones, learned of Hose’s presence and, aware of the reward, arranged with another farm worker to lure Hose to a party where he was apprehended.<sup>30</sup> The farm owner tried to disguise Hose prior to going on a train so that he could be delivered to law enforcement officials as the terms of the reward required.<sup>31</sup> En route, a passenger recognized Hose.<sup>32</sup> At a particular stop, sheriffs from two counties were waiting.<sup>33</sup> They, Jones, and railroad company representatives decided that a special train would be used for the remainder of Hose’s journey.<sup>34</sup> One hundred fifty unofficial, armed escorts went on that special train.<sup>35</sup> When the train arrived at Newman, dozens more men were waiting.<sup>36</sup> Sheriff Joseph Brown and Jones were worried about the mob and agreed that they would escort him to the jail, at which point Jones would collect the award, and then Hose would be subsequently turned over to the lynch mob.<sup>37</sup> However, as he was being marched to the prison, the mob turned on the sheriff, pointing a pistol at the sheriff and demanding that Hose be turned over to them immediately.<sup>38</sup> The march to the final destination where the mob eventually lynched Hose took time, during which trains arrived carrying spectators who had come after Sunday mass to witness the lynching.<sup>39</sup> All told, 4000 spectators were present to participate in or witness the unspeakably brutal murder of Hose.<sup>40</sup>

As this case makes clear, it was not simply a matter of lack of will on the part of government officials to enforce legal protections to which Black men like Hose were

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25. *Id.* at 5.

26. *Id.* at 12.

27. DRAY, *supra* note 22, at 8.

28. *Id.*

29. *Id.* at 9.

30. *Id.*

31. *Id.*

32. DRAY, *supra* note 22, at 9.

33. *Id.* at 10.

34. *Id.* at 13.

35. *Id.* at 10.

36. *Id.*

37. DRAY, *supra* note 22, at 10.

38. *Id.*

39. *Id.* at 12–13.

40. *Id.* at 13.

entitled. Citizens can render futile the actions of government officials in defense of the rule of law, and Hose's story makes clear the ways in which this was so.

To blame citizens alone for murder in cases like Hose's is to offer an incomplete characterization of these cases. This characterization misses the political character and purpose of his death. Hose's death, and the role of citizens in it, was wrong not just because a human life was extinguished in a brutal manner, though it was wrong for this reason. It was wrong also because it was the demonstration on the part of thousands of citizens of a lack of willingness to restrain themselves in the way that law demands when faced with an alleged rape of a White woman and killing of a White man by a Black suspect. It was wrong because of the manner in which the actions of the sheriff were rendered futile, and the meaningfulness of law governing conduct was in fact undermined. This was not an ordinary criminal murder; it was political in its purpose and broader in its impact on the possibility of respect for law by officials.

As this case illustrates, law depends on cooperative action and interaction between citizens and officials, as well as among officials. Citizens may certainly guard against the implementation of unjust rules, as Gowder rightly notes, but through their actions they can also impede the enforcement of rules worthy of protection. Such actions are rightly deserving of critique from the perspective of the rule of law, a critique that Gowder's account does not provide resources for us to make.

While I am critical of an assumption underpinning and orienting Gowder's analysis, I am highly impressed by the book as a whole. It provides one of the most comprehensive conceptual, normative, empirical, and historical accounts of the rule of law to date. It demonstrates why and how these various approaches to the rule of law can and should be engaged with each other. And it offers a compelling and original analysis of what the rule of law is and why it is of normative value, not only theoretically but also practically.